

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

_____/

REPLY TO JQC'S RESPONSE TO JUDGE HOLLOWAY'S MOTION TO
DISMISS AND MOTION FOR SANCTIONS

The Judicial Qualifications Commission (JQC) contends in its Response that Judge Holloway's Motion to Dismiss was mere subterfuge, a "blatant attempt to shift the focus away from Judge Holloway's conduct." However, Respondent's Motion to Dismiss requested this Court to carefully examine the JQC's actions and procedures and to determine whether it is necessary to reform the system, to reign in those who have exceeded their authority, to define roles and to curb and correct abuses that have occurred in this case. Judge Holloway has raised these issues before this Court, as the ambiguities undermine the fundamental fairness of the proceedings and the integrity of the process.

The JQC ineffectively argues that this Court has no authority to consider Judge Holloway's Motion to Dismiss

and Motion for Sanctions. According to the JQC, Judge Holloway should have presented her motion to the Hearing Panel so that members of that Panel could decide whether members of their own organization had acted improperly and to also consider the conduct of their own Special Counsel during the final hearing. The JQC was aware that substantial problems existed and yet, no remedy was ever employed or even suggested. It is entirely appropriate for Respondent to seek consideration of these issues before this Court.

This Court in In Re Kelly, 238 So.2d 565, 571 (Fla. 1970) outlined the role of the JQC and the limits of its powers:

While the Judicial Qualifications Commission is not technically a judicial tribunal, its findings and recommendations should be considered as though an intermediate agency of this Court. The Commission is in fact an arm of this Court dealing with a vital function of the Court and under its exclusive jurisdiction. While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the Florida Judicial Qualifications Commission are entitled to receive due consideration and are of persuasive force. . . . However, the ultimate responsibility of making a determination rests with this Court, for Sec. 17A(3), Fla. Const., requires that the Supreme Court, after reviewing the record, "shall order removal, discipline or retirement, as it finds just and proper, or

wholly reject the Commission's recommendation." See also In re Frank, 753 So.2d 1228, 1234 (Fla. 2000) ("the ultimate power and responsibility in making a determination rests with this Court"); State v. Earle, 295 So. 2d 609, 610-11 (writ of prohibition not available as a remedy to preclude JQC from prosecuting charges since JQC had "no power to enter judgments or orders.").

The JQC works in a ministerial capacity for the Supreme Court. It has no authority to enter any final orders and, although its recommendations on judicial discipline and punishment are often accepted, the Supreme Court is under no obligation to do so. This is in direct conflict from the JQC's position that this Court has only "review jurisdiction"; that the JQC has the exclusive power to police itself; and that this Court is without authority or jurisdiction to rectify the harm caused by an investigation conducted in bad faith or prosecutorial misconduct.

Respondent has provided this Court with ample evidence that the testimony proffered by Special Counsel with respect to the tree injunction was false and was known to be false by Special Counsel prior to the final

hearing. The JQC contends that these were merely "testimonial irregularities" that are commonplace in court proceedings and involved merely a conflict between the testimony of Jeanne Tate and that of Randy Emmerman. This Court also has the testimony of Judge Holloway and the Tampa Police Officer Elkington, which were included in Judge Holloway's Response to the Show Cause Order.

This is not an issue of conflicting testimony. Special Counsel knew that Randy Emmerman was not present at the time in question and chose to put on his testimony, over that of independent witnesses Jeanne Tate and Officer Elkington, because it served her purposes and was the only hope of supporting a baseless charge. It is ironic that false testimony adduced by the JQC is to be ignored as "testimonial discrepancies" while the JQC urges that Judge Holloway be given the most severe punishment for testimony that the JQC claims to be inaccurate. Using the JQC's logic, no person could ever give false testimony or be found guilty of perjury since those would just be "testimonial discrepancies," even if the witness completely fabricated testimony.

The JQC has also argued that Special Counsel's

prosecutorial misconduct in offering this testimony should be ignored because it caused no harm. However, the dismissal of the charges does not erase the harm. It appears that this charge was dismissed so that the misconduct would not be detected. In fact, the dismissal might not have been permitted under JQC rules.

This Court has clearly pronounced the duties and obligations of prosecutors, which would be equally applicable to Special Counsel in these proceedings:

The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court observed over sixty years ago that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served [A prosecutor] may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Thus, a prosecutor has a duty not only "to fairly present the evidence and permit the jury to come to a fair and impartial verdict", but also "properly functions in a quasi-judicial capacity with reference to the accused . . . to see that the accused is afforded a fair and impartial trial." By nature of their position, prosecutors direct the power of the government against an accused person. Therefore, prosecutors must "be ever mindful of their awesome power and concomitant responsibility . .

. [to] reflect a scrupulous adherence to the highest standards of professional conduct."

Florida Bar v. Cox, 794 So.2d 1278, 1285 (citations omitted). Special Counsel has provided this Court with no argument as to why the JQC's prosecutor is not under the same prosecutorial obligations as those set forth in Cox. Instead, in an effort to sidestep these responsibilities, Special Counsel feebly argues that it is "under no obligation to present Judge Holloway's side of the story."

There is a distinction that has been lost in these proceedings. There is a significant difference between a prosecutor who is involved in a fair and thorough investigation and offers only the evidence which best supports the prosecution at trial versus a prosecutor who is involved in a poorly-conducted, incomplete investigation of unfounded charges who proffers known, false testimony in hopes of proving the charges. Admittedly, prosecutors are expected to make arguments based upon fair comment on the evidence and certainly should not be punished for working zealously in this regard. However, if the "evidence" includes false testimony that the Special Counsel knew or should have

known was false, there can be no "fair comment."

Prosecutors need to be especially wary of witnesses with motives to harm the person charged and with witnesses who are all too eager to assist with the prosecution.

Prosecutors need to be cautious with witnesses whose stories are not only in contradiction to the testimony of uninterested third parties but also whose stories fit far too neatly with themes that are being pursued by the prosecution or that nicely fill holes in the prosecution's case. All of these red flags were present here. Special Counsel had an obligation to evaluate the witnesses who were all too eager to help her, to ask herself why those witnesses' stories were so markedly different than the testimony of others, and to make the decision of whether she was faced merely with conflicting testimony or fabrication. This is not an issue of turning over exculpatory information to the person charged or being required to present both sides of a case, as argued by the JQC. Instead, it is the more fundamental issue of whether a prosecutor chooses to win at all costs or to only prosecute charges that are supported by competent, reliable, and trustworthy

evidence.

In these proceedings, the JQC has used bifurcation when it was helpful, and then abandoned bifurcation when it became a burden. Bifurcation has been mandated by the Constitution for more than a decade. Art. V, Sec. 12, Fla. Const. It is not something to be used or not at the whim of the JQC. For example, the JQC tortured Rule 7 to support Judge Wolf's presence at the final hearing. Rule 7 indicates merely the source from which the Hearing Panel will receive the formal charges, just as the preceding rule outlines the conduct of the proceedings from the initial filing of a complaint through the probable cause hearing and issuance of formal charges. The Rules do not support the assertion that Judge Wolf had the "responsibility" as Chairman of the Investigative Panel to oversee the proceedings of the Hearing Panel.

The JQC's Response completely failed to address the most important bifurcation issue raised by Judge Holloway. In this case, the Investigative Panel and the Hearing Panel lobbed jurisdiction back and forth like a ping-pong ball and even, at one point, claimed to have concurrent jurisdiction, the antithesis of bifurcation.

In fact, this Court should note that Judge Jorgenson announced at the beginning of the hearing that he had unilaterally "returned" jurisdiction to the Investigative Panel.¹ Settlement negotiations were derailed when the JQC claimed that bifurcation required approval of the settlement agreement by the entire Investigative Panel despite the fact that the Hearing Panel had jurisdiction. On the other hand, during the final hearing, Special Counsel dismissed the tree injunction charge without the approval of the full investigative panel.

Respondent respectfully seeks guidance from this Court on bifurcation, the duty and ability to dismiss unfounded charges and the identity of the party who can properly negotiate on behalf of and bind the JQC. Resolution of these issues will provide responding judges the opportunity to amicably settle these cases and to submit stipulations to this Court without the need for time consuming and expensive evidentiary hearings before the Hearing Panel. Judge Holloway once again requests that this Court dismiss these JQC proceedings due to the bad faith of the JQC and the misconduct of its Special

¹ HT 5:11.

Counsel and grant such other and further relief as is
necessary to mitigate the harm to Judge Holloway.

Respectfully submitted,

SCOTT K. TOZIAN, ESQUIRE
SMITH & TOZIAN, P.A.
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813) 273-0063
FL Bar# 253510
Attorneys for Respondent

Rywant, Esquire

Michael S.

RYWANT, ALVAREZ, JONES,
RUSSO & GUYTON, P.A.
109 North Brush Street
Suite 500
P. O. Box 3283
Tampa, Florida 33601
(813) 229-7007
FL Bar# 240354
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2002,
the original of the foregoing Reply to JQC'S Response to
Judge Holloway's Motion to Dismiss and Motion for
Sanctions has been furnished by UPS overnight delivery
to: Honorable Thomas D. Hall, Clerk, Supreme Court of
Florida, 500 South Duval Street, Tallahassee, Florida
32399-1927 with copies by U.S. Mail to:

Lauri Waldman Ross, Esquire

Two Datan Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156-7818

Timothy W. Ross, Esquire
Kaye, Rose & Partners, LLP
One Biscayne Tower, Suite 2300
Two South Biscayne Blvd.
Miami, Florida 33131

Beatrice A. Butchko, Esquire
Ferrell, Schultz, Carter
Zumpano & Fertel, P.A.
201 South Biscayne Boulevard
34th Floor
Miami, Florida 33131

John Beranek, Esquire
General Counsel
Ausley & McMullen
Washington Square Building
227 Calhoun Street
P. O. Box 391
Tallahassee, Florida 32302

Ms. Brooke Kennerly
Executive Director
Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

Honorable James R. Wolf
Chair, Investigative Panel
Judicial Qualifications Commission
First District Court of Appeals
301 South Martin Luther King Jr., Blvd.
Tallahassee, Florida 32399-1850

Honorable James R. Jorgenson
Chair, Hearing Panel
Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

—
SCOTT K. TOZIAN, ESQUIRE